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No. 9295

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIE HUNG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant herein respectfully petitions the Court to grant a rehearing in the above entitled case.

FIRST.

This Court, in disposing of our contention, that there was no sufficient evidence to support a conviction on the first count of the indictment, said, in its opinion: "While at the time of the first sale the actual delivery was not observed, the evidence leaves no *rational ground for belief* that the opium was *not* obtained from appellant". (Italics ours.)

We submit that the presumption of innocence in favor of the appellant is vastly superior to a "rational ground for belief of his guilt". A "belief", rational, or otherwise, in criminal law, has no place as against the presumption of innocence. If we are to cling to the immutable precepts of justice and to enforce rights secured by the Constitution of the United States, then a conviction based on a "rational belief" must be impotent as against the presumption of innocence.

The presumption of innocence is evidence in behalf of one accused of crime. A "rational belief" is certainly not evidence.

In the great and leading case of *Coffin v. United States,* 156 U. S. 432, *459-460,* 39 L. Ed. 481, *493,* Mr. Justice White thus stated the doctrine of presumption of innocence:

> "Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.
>
> Greenleaf thus states the doctrine: 'As men do not generally violate the penal code, the law pre-

sumes every man innocent; but some men do transgress it, and therefore evidence is received to repeal this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, *as matter of evidence, to the benefit of which the party is entitled'*. ('On Evidence', Part 1, Sec. 34.)

Wills on Circumstantial Evidence says: 'In the investigation and estimate of criminatory evidence there is an antecedent prima facie presumption in favor of the innocence of the party accused, grounded in reason and justice, not less than in humanity and recognized in the judicial practice of all civilized nations; which presumption must prevail until it be destroyed by such an overpowering amount of legal evidence of guilt as is calculated to produce the opposite belief'. Best on Presumptions declares the presumption of innocence to be a *'presumptio juris'*. The same view is taken in the article in the Criminal Law Magazine for January, 1888, to which we have already referred. It says: 'This presumption is in the nature of evidence in his favor (i. e., in favor of the accused), and a knowledge of it should be communicated to the jury. Accordingly, it is the duty of the judge in all jurisdictions, when requested, and in some when not requested, to explain it to the jury in his charge. The usual formula in which this doctrine is expressed, is that every man is presumed to be innocent until his guilt is proved beyond a reasonable doubt. The accused is entitled, if he so requests it * * * to have this rule of law expounded to the jury in this or in some equivalent form of expression'.

> The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris,* demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy."

Mr. Justice Henshaw, speaking for the Supreme Court of California, in *People v. Strassman,* 112 Cal. 683, *687,* said:

> "That a conviction of perjury cannot be supported upon such insufficient and incomplete evidence does not admit of discussion. The only argument advanced by the people is that, having showed title in Hilda Strassman more than a year before the date of the alleged crime, the law presumed that she continued to own it until the defendant overcomes the presumption. But all such disputable presumptions give way before the presumption of innocence which belongs of right to every defendant, and which remains with him until the prosecution by convincing proof has established his guilt. As is said in People v. Douglass, 100 Cal. 1, there cannot be two presumptions in a criminal case. In the recent case of Hunter v. Hunter, 111 Cal. 261, this court considered at some length the question of conflicting presumptions, and quoted with approval from Matthews on Presumptive Evidence: 'A charge of an act of immorality or of disobedience of a positive law will not be received unless supported by direct evidence. Circumstances showing probability merely are not enough; the fact averred must be conclusively proven'."

In *People v. Scott,* 22 Cal. App. 54, the syllabus clearly indicates the opinion of the District Court of Appeal, Third Appellate District:

> "The *presumption of delivery,* which follows from the possession of an instrument, *cannot be indulged in opposition to the presumption of innocence,* where a material element of a serious criminal charge, such as selling land twice, is involved." (Italics ours.)

In *Dalton v. United States,* 154 Fed. 461, *463,* the Circuit Court of Appeals for the Seventh Circuit said:

> "The rule for which counsel contends in support of the submission to the jury of 'the inference or presumption of continuance arising from the facts and circumstances proven' is inapplicable, as we believe, in any view of the strength of 'the presumption of innocence, as evidence in favor of the accused, introduced by the law in his behalf' (Coffin v. United States, 156 U. S. 432, 458, 460, 15 Sup. Ct. 394, 39 L. Ed. 481) under these changed conditions. With the chain of evidence incomplete to connect the accused with such criminal change of course, by presence, acquiescence, or other coincident circumstances, the citations from the ruling and opinion in Dunlop v. United States, 165 U. S. 486, 503, 17 Sup. Ct. 375, 41 L. Ed. 799, are not deemed applicable; and we are not satisfied that facts were presented to authorize an inference that the plaintiff in error remained in the venture at and after the change. Under the established rule of our criminal law, however, as well defined in Coffin v. United States, supra, the 'presumption of innocence is an instrument of proof created by the law in favor of

> the accused', and the presumption that the accused would not remain in the concern when it turned into a criminal course would set aside or overcome the assumed inference of fact relied upon."

We have looked in vain for a text-writer or an authority which holds that "a rational ground for belief" can overcome the presumption of innocence.

We do not believe that a "rational ground for belief" can overcome the presumption of innocence, which is evidence in behalf of one accused of crime.

Nor does the evidence, as to the first count of the indictment, justify this Court in its "rational ground for belief" that the appellant is guilty. In its opinion, it deduces this "rational ground for belief" from the mere fact that when the informer was first searched he had $180.00 upon his person and when searched some two hours after the $180.00 was gone and in its place was a 5-tael can of opium and that he was seen in company of the appellant.

The vital missing link to this deduction is the fact that the informer was not produced as a witness.

Nor does the evidence justify this Court in its "rational ground for belief". The informer was followed for some two or three hours, flitting around from place to place, at times in the company of the appellant and at other times not. There was plenty of opportunity to obtain the opium from some place or person other than the appellant. The witness Lachenauer, for the prosecution, admits he did not see the delivery and that he could not keep the in-

former and the appellant under constant surveillance and that he did not go into the restaurant but stood across the street some 50 feet away his view constantly obstructed and blurred by passing pedestrians, vehicles and automobiles. He testifies:

> "I followed the informer to Washington Street, and he went * * * *into* a Chinese restaurant at 1019 Grant Avenue. The defendant was ahead of the informer. I seen the defendant *walking through* the restaurant on the corner. * * * And I did not see the defendant *after he went into the restaurant until about fifteen or twenty minutes later,* when I saw him come into 1019 Grant Avenue where I had previously seen the *informer enter.*" (Tr. 122.) "* * * *The informer came out of the restaurant first. I was mistaken when I said the defendant came out first.*" (Tr. 123-124.) "* * * I did not see anyone other than the defendant contact the informer *as far as I was able to see.*" (Tr. 124.)

"As far as I was able to see" is too equivocal and uncertain testimony upon which to justify conviction for a felony on the first count of the indictment.

The agent Lachenauer does not testify that he was *in* that restaurant *at any time;* nor is he able to testify who the informer met in the restaurant besides the appellant nor what transpired in the restaurant. Under this state of the testimony, how this Court can conclude that there is "a rational ground for belief" that the informer got the opium from the appellant is difficult to understand. At best, the evidence of guilt was purely circumstantial and the

circumstances were equally consistent with the innocence of the appellant as with his guilt and was supported by his denial on the stand.

As was well said by the Circuit Court of Appeals for the Eighth Circuit in the case of *Wright v. United* States, 227 Fed. 855, *857:*

> "The legal presumption was that he was innocent of that crime until he was proved to be guilty beyond a reasonable doubt. The burden was upon the Government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial Court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction."

Even if "rational ground for belief" should be deemed to rise to the dignity of a strong probability, that has been condemned time and again by the Courts of the land, Federal and State, as being totally insufficient to sustain a judgment of conviction.

As was well said in *People v. Strassman,* supra: "Circumstances showing probability merely are not enough; the fact averred must be *conclusively proven".*

We respectfully submit that there is no sufficient evidence to justify this Court in its "rational ground

for belief" that the appellant was guilty under the first count of the indictment and that such "rational ground for belief" cannot overcome the presumption of innocence, which constitutes evidence in behalf of the appellant, and that a reversal as to the first count should follow.

Furthermore, the fact that the informer was not produced by the prosecution as a witness should be given great weight.

Was it because he was vulnerable as a witness? Was it because he would not have testified that he got the opium from the appellant? He was a stool-pigeon and a spy—one of the lowest forms of human beings—he was an acquaintance and fraternal member of a lodge with the appellant. (Tr. 210.) His identity was well known to the narcotic agents, his name being Mr. Lim. (Tr. 207-208.) With the full knowledge, consent and active cooperation of the narcotic agents, Mr. Lim presumed upon his acquaintance and friendship with the appellant and incited, urged, importuned and encouraged him, for the purposes of entrapping him, into the commission of the alleged offenses charged in the indictment. (Tr. 207-210; 210-226.) There is no pretense that he was not available as a witness; that he had absconded or gone away. He simply was not called as a witness by the prosecution when his testimony would have been decisive and conclusive as to appellant's guilt.

It is well settled that where lesser and weaker evidence is introduced where a party has in its power to

produce stronger and better evidence that this is an important factor to be considered and will, in and of itself, create a presumption against the party, having in its power to produce the stronger and better evidence, that he could not have done so, or that it would have been prejudicial to his case.

"From the failure of a party to produce evidence within his control, and which it is his duty to produce, a presumption or inference arises that if the evidence were produced it would be unfavorable to him; and this rule has been applied *equally in criminal* as in civil cases."

Vol. 22 *Am. & Eng. Ency. Law* (2d) p. 1257 and many cases.

"*Failure to Produce Most Satisfactory Evidence.*—If the weaker and less satisfactory evidence is given and relied on, when it is apparent to the court that evidence of a more explicit and direct character is within the power of the party, the same caution which rejects secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and it may be presumed that if the more satisfactory evidence had been given, it would have been detrimental to the party who fails to produce it, and would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."

Vol. 22 *Am. & Eng. Ency. Law* (2d) p. 1258 and cases.

"*Failure to Call Witness.*—The rule has been frequently announced that the failure of a party

to call a friendly witness, having personal knowledge of the facts in issue, raises a presumption or inference that the witness's testimony would have been detrimental to him."

Vol. 22 *Am. & Eng. Ency. Law* (2d) p. 1261 and many cases.

These rules of evidence are condensed in the California law as follows:

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind. * * *

5. That evidence willfully suppressed would be adverse if produced;

6. That higher evidence would be adverse from inferior being produced."

See

Sec. 1963, Subs. 5 and 6 of *Code of Civil Procedure.*

In the case of *Graves v. United States,* 150 U. S. 118, *121,* 37 L. Ed. 1021, *1023,* the United States Supreme Court, through Mr. Justice Brown, said:

"The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. 1 Starkie Ev. 54; People v. Hovey, 92 N. Y. 554, 559; Mercer v. State, 17 Tex. App. 452, 467; Gordon v. People, 33 N. Y. 508."

So that the failure of the prosecution to call the informer should render very tenuous the "rational ground for belief" that the opium was obtained by the informer from the appellant, as declared by this Court in its opinion.

We respectfully submit that a reversal should be granted as to the first count of the indictment.

SECOND.

This Court, in its opinion, holding that the "Court properly instructed the Jury on the subject of entrapment", went further and holds:

> "The jury were entitled to conclude from the evidence that the intent and purpose to violate the law were present, and that the officers had done no more than furnish appellant the opportunity of committing the offense. It is enough to say that the showing of entrapment was not so clear as to entitle appellant to an acquittal as a matter of law."

How could the jury "conclude from the evidence that the intent and purpose to violate the law were present", when the only evidence on that subject was that offered by the appellant himself *and which was not contradicted.* The informer was not called to contradict the appellant's testimony.

The very fact that he was not called invites the presumption or inference that the testimony of the appellant, as to the various features of the entrapment

by the informer, was absolutely true; otherwise he would have been called as a witness to contradict appellant.

The appellant's testimony established indubitably that the informer had repeatedly importuned him, solicited him, urged him to sell him some opium and *that he refused to do so.* Besides that, there is not the slightest evidence adduced on the part of the prosecution that the appellant had ever before on a single occasion sold opium or dealt in opium in any way, shape or form. It was the narcotic agents who furnished the money to lure, to incite, to encourage the appellant to commit the offenses, if any were committed. It was the narcotic agents who sought out the appellant, through their Chinese stool-pigeon, who was not produced as a witness, not the appellant who sought out the stool-pigeon.

Under this state of the record, the testimony of the appellant not being contradicted, it became a question of law as to whether the defense of entrapment had not been established, which question should have been decided as a question of law by the trial Court and it should have instructed the jury to acquit on both counts of the indictment.

The several authorities cited by us in our opening brief all so hold and amply support our contention. (See Opening Brief, pp. 32-47.)

As stated, the testimony of the appellant was undisputed. Sec. 1844 of the *Code of Civil Procedure* provides:

> "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

Indeed, this is only declaratory of the general law on the subject.

The testimony of the appellant, standing uncontradicted and unimpeached, on the subject of entrapment must be accepted as true.

In the case of *Stewart v. Silva,* 192 Cal. 405, Mr. Justice Lennon, in concurring in the opinion by the Court, at page 411, says:

> "I concur in the conclusion of Mr. Justice Wilbur, which results in a reversal of the judgment in this case, primarily for the reason that it is the general rule that uncontradicted and unimpeached testimony of a witness tending to establish an issuable fact in the case may not be arbitrarily disregarded by the trial Court. (Citing cases.) To the contrary, such testimony must be accepted as proof of the fact which it is offered to establish unless it can be said that such testimony is so inherently incredible and improbable as to amount to no testimony at all. (Citing cases.)"

Where facts are testified to by a witness who is not impeached, and there is no inherent improbability in his statement, the jury are bound to take that evidence as proving the particular facts, and the jury has no right capriciously to disregard evidence where it is not controverted.

Hayward v. Rogers, 62 Cal. 348.

Where a defendant testifies specifically concerning the circumstances of a transaction, and his testimony is not impeached nor contradicted, such testimony must be taken as true.

Gage v. Billing, 12 Cal. App. 688.

In the case of *Hynes v. White,* 47 Cal. App. 549, the Court at page 552 of the opinion says:

> "a court may not arbitrarily disregard the unimpeached testimony of a single witness."

In discussing this question, Mr. Justice James, in the case of *Hutchinson v. Holland,* 47 Cal. App. 710, at page 712, says:

> "The testimony of Holland stands uncontradicted. It may be that the court disbelieved his statements, but as the evidence discloses them, the statements do not bear the imprint of inherent improbability; hence we must conclude that they amounted to substantial evidence and that the court was not authorized to disregard them."

In the case of *Shepard v. Shepard,* 65 Cal. App. 310, Mr. Justice Nourse, at pages 313 and 314 of the opinion, says:

> "We come then, to the only point of law involved on this appeal, and that is whether the trial court may reject all the evidence in the case and base his judgment upon his own suspicions arising outside of the record. The last expression of the Supreme Court is found in the concurring opinion of Mr. Justice Lennon in Stewart v. Silva, 192 Cal. 405 (221 Pac. 191), in which he says 'that it is the general rule that the un-

> contradicted and unimpeached testimony of a witness tending to establish an issuable fact in the case may not be arbitrarily disregarded by the trial court. (Citing cases.) To the contrary, such testimony must be accepted as proof of the fact which it is offered to establish unless it can be said that such testimony is so inherently incredible and improbable as to amount to no testimony at all. (Citing cases.)' "

See, also:

Anso v. Anso, 72 Cal. App. 513;
In re Sullivan, 190 Cal. 229.

So that, when this Court, in its opinion, stated: "The jury were entitled to conclude from the evidence that the intent and purpose to violate the law were present", it had only the evidence of the appellant himself and his testimony is undisputed and uncontradicted on the subject of entrapment. His testimony, standing alone uncontradicted and unimpeached, makes out the clearest kind of a case of entrapment.

This Court, any more than the trial Court, has no right arbitrarily to disregard the undisputed, uncontradicted and unimpeached testimony of the appellant on the subject of entrapment. Without his testimony on that subject, there is no other testimony or evidence of any kind relating to the defense of entrapment.

In closing this petition for rehearing, we can do no better than to use the language of Mr. Justice Harlan of the United States Supreme Court rendered in the

case of *Crain v. United States,* 162 U. S. 625, *646,* 40 L. Ed. 1097, *1103:*

> "The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of the trial court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

We respectfully submit that this petition for a rehearing should be granted for the reasons above stated.

Dated, San Francisco,
June 1, 1940.

Respectfully submitted,
RUSSELL P. TYLER,
MARSHALL B. WOODWORTH,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
June 1, 1940.

MARSHALL B. WOODWORTH,
Of Counsel for Appellant and Petitioner.